COLLECTOR OF LAND REVENUE, SINGAPORE v. PHILIP HOALIM

[P.C. (Lord Salmon, Lord Cross of Chelsea, Lord Fraser of Tullybelton and Lord Russell of Killowen) December 21, 1976]

[Privy Council Appeal No. 33 of 1975]

Land Acquisition — Compulsory acquisition of island off the coast of Singapore — Compensation — Covenant in original grant — Construction of — Whether purchaser had notice — Land Acquisition Act (Cap. 272).

Registration of Deeds — Whether original Crown Grant should be registered — Whether admissible in court — Registration of Deeds Act (Cap. 281).

Land Law — Original Crown Grant — Construction — Condition or Covenant — Conveyancing and Law of Property Act (Cap. 268), s. 3(5).

This was an appeal from the decision of the Court of Appeal of Singapore ([1975] 1 M.L.J. 231). The respondent in this case owned an island off the coast of Singapore. The Collector of Land Revenue gave notice of compulsory acquisition of the island for public purposes. The original Crown or State grant of the island to one Angus in 1860 contained a provision enabling the State, if it should be required for public purposes, to reacquire the island, paying therefor the latest purchase price plus any money that had been expended on the land by the owner. The Collector of Land Revenue did not proceed under that provision but he set in motion the ordinary processes of compulsory acquisition for public purposes. But in ascertaining what a notional purchaser in the market would pay for the island it was relevant to consider whether the 1860 reacquisition provision was still enforceable at the date of the publication of the notice of compulsory acquisition. The Appeals Board constituted under the Land Acquisition Act stated a case for consideration by the Court of Appeal setting out a number of questions of law upon which guidance was sought. On appeal to the Privy Council, three questions remained outstanding for the determination by the Privy Council: (1) whether the Registration of Deeds Ordinance 1886, which required registration of conveyances of land in default of which the document was (in broad terms) not to be recognised by law, applied to all original state grants of land as distinct from subsequent assurances by subjects; (2) whether the Court of Appeal was right in holding that the provision for reacquisition in the 1860 grant amounted not only to a covenant by Angus but also to a condition of the grant; (3) whether, if the provision for reacquisition was of the nature of a covenant only conferring upon the State an equitable interest in the land, the respondent had constructive notice thereof when he bought the land in 1951.

Held: (1) the Registration of Deeds Ordinance, 1886, did not apply to a grant by the Crown (State) of land in Singapore. Non-registration will therefore not avail the respondent, who could only succeed in avoiding a depressant effect on the market value of the land of the provision in the 1860 grant if (a) he is correct in saying that the provision operated by way of convenant and not also by way of condition and (b) he purchased the land in 1951 without notice actual or constructive of the provision;

(2) the language of the 1860 grant was not such as to impose a condition. The provision therefore was a covenant creating an equitable interest in the land and not also a condition;

(3) the respondent did not have constructive notice of the provision in the original Crown grant.

Cases and authorities cited:

The following authorities and cases were cited in argument: *Sheppard's* Touchstone, 122; *Viner's* Abridgment, p. 45; *Coke* on Littleton, p. 203, ss. 328 to 331; *Province of Bombay* v. *Municipal Corpn. of the City of Bombay & Anor.* [1947] A.C. 58; *Feather* v. *The Queen* (1865) 35 L.J.Q.B. 200; *Attorney-General* v. *Goldsborough* (1889) 15 V.L.R. 638; *Premchand Nathu & Co. Ltd.* v. *Land Officer* [1963] 1 All E.R. 216; *Commissioners of Income Tax* v. *Pemsel* [1891] A.C. 531, 590-591; *Tanpiri Coal Mines* v. *The King* [1943] N.Z.L.R. 466; *Strand Securities Ltd.* v. *Caswell* [1965] Ch. 958;*Simpson* v. *Titterell* Cro. Eliz. 242; 78 E.R. 498; *Pembroke* v. *Berkley*, Cro. Eliz. 348, 560; 78 E.R. 630; *Doe d'Henniker* v. *Watt* 8 B.C. 308; 108 E.R. 1057; *London & South Western Bldg. Co.* v. *Gomm* (1882) 20 Ch.D. 562; *Bashir* v. *Commissioner of Lands* [1960] A.C. 44, 51; *Cooper* v. *Stuart* (1889) 14 App. Cas. 286; *Schuler* v. *Wickman Tools* [1973] 2 W.L.R. 683, 688; *Attorney General* v. *Cummins* [1906] 1 I.R. 406; *Wilkes* v. *Spooner* [1911] 2 K.B. 473; *Llewellyn* v. *Jersey* 11 M. & W. 183; 152 E.R. 767; *Hooper* v. *Bromet* 89 L.T. 37; *Pakman* v. *Herland* (1881) 17 Ch. D. 353; *The Attorney-General* v. *Lim Chin Swi* (1904) 9 S.S.L.R. 6; *Syed Ali* v. *Syed Omar* (1918) 15 S.S.L.R. 103, 116.

PRIVY COUNCIL APPEAL FROM SINGAPORE.

G. Starforth Hill for the appellant.

Y.R. Jumabhoy for the respondent.

Lord Russell of Killowen (delivering the judgment of the Board): The respondent and cross-appellant Hoalim owned an island off the coast of Singapore. Under the relevant legislation the appellant Collector gave notice of compulsory acquisition for public purposes. Compensation therefore falls to be assessed on the basis of the market value of the subject land at the time of publication of the notice of compulsory acquisition. The original Crown or State grant of the subject land (the island) to one Angus in 1860 contained a provision enabling the State, if it should be required for public purposes, to reacquire the subject land, paying therefor only the latest purchase price plus any money that had since been expended on the land by the owner. (This was the construction favoured by the Court of Appeal — Record page 51 — and it has not been challenged before their Lordships). This, it may be assumed, would be less than the market value of the land without such a provision for its reacquisition. The Collector did not seek to enforce that provision: as indicated he set in motion ordinary processes of compulsory acquisition for public purposes. But in ascertaining what a notional purchaser in the market would pay for the subject land it is relevant to consider whether the 1860 reacquisition provision was still enforceable on the date of publication of the notice of compulsory acquisition.

The relevant tribunal, before deciding upon the figure of compensation, stated a case for consideration by the Court of Appeal setting out a number of questions of law upon which guidance was sought. Of these questions three remain outstanding for consideration and determination by their Lordships.

The first question is whether the Registration of Deeds Ordinance of 1886, which required registration of conveyances of land in default of which the document was (in broad terms) not to be recognised by law, applied at all to original State grants of land as distinct from subsequent assurances by subjects. The Court of Appeal held that it did so apply so as to require registration of such State grants: and that the defects resulting from non-registration operated against the Crown or State seeking to enforce some provision in the grant in favour of the State such as the provision for reacquisition at a limited price already mentioned. That view of the law being adverse to the Collector he appeals against it. The other two remaining questions arise if the Court of Appeal was wrong on the first question and are the subject of Hoalim's cross-appeal.

The second question is whether the Court of Appeal was right in holding that the provision for reacquisition in the 1860 grant amounted not only to a covenant by Angus but also to a condition of the grant. It is common ground that if the Court of Appeal was right on the second question the third question does not arise, because a purchaser for value without notice actual or constructive cannot on that ground take free from the condition. The third question is whether, if the provision for reacquisition is of the nature of a covenant only conferring upon the State an equitable interest in the subject land, Hoalim had in the circumstances constructive notice thereof when he bought in 1951. The Court of Appeal held that he had constructive notice. No question whether he had actual notice fell to be determined by the Court of Appeal: nor is it before the Board.

It is convenient to add at this point that no question of remoteness or perpetuity is raised in this cross-appeal, and their Lordships say nothing on that subject.

The grant to Angus dated April 26, 1860 was by the Secretary of State for India on behalf of Her Majesty. It is not disputed that the State of the Republic of Singapore is the successor of the Crown for present purposes. The consideration paid by Angus was Rs. 1,320. The land was granted in conveyancing terms appropriate to create a fee simple in Angus. The land was described as

"All that Island called and known by the name of Pulo Tikong Kitchil situated between Pulo Obin and Pulo Tikong Besar whereof the lines of boundary and their bearings [are] laid down in the plan endorsed hereon, certified under the hand of the Surveyor General estimated to contain an Area of Two hundred and twenty acres together with the appurtenances."

It is to be observed that, since the land granted is an island identified by name and by its position in relation to two other named islands, no further identification by plan could possibly be required: and it is not surprising to find that the plan is no more than an outline with what appear to be measurements between points along that outline, and without any bearings at all, which would be appropriate only to identification of a plot or area on the mainland. In effect a common form was adopted though not suited to the grant of an entire island. There follows the habendum, and after a semi-colon the words which their Lordships have referred to as the provision for reacquisition by the State, as follows:

"Subject nevertheless to the conditions (sic) hereinafter mentioned that is to say the said Gilbert Angus for himself his Heirs Executors Administrators and Assigns Doth hereby covenant and agree to surrender and make over unto the said ...[State]... the said Land and premises should it at any time be required for public purposes, upon a requisition made to him to that effect in writing and upon the payment to him... his Heirs... [etc.] by the said... [State]... of all sum or sums of money that the said... his Heirs... [etc.] ... may or shall have incurred expended (sic) upon the said Land."

Upon this language turns the second question whether there is here not only a covenant but also a condition of the grant.

In 1878 Angus sold the subject land to the Sultan of Johore: it was described as "the hereditaments described in the Schedule hereto". The Schedule was in these terms:

"All that Island called or known by the name of Pulo Tikong Kitchil situated between Pulo Obin and Pulo Tikong Besar whereof the lines of boundary and their bearings are laid down in the plan endorsed on a certain Indenture dated April 26, 1860 and made between... [etc. etc.]... certified under the hand of the then Surveyor to Government estimated to contain an area of 220 acres...."

The 1878 conveyance was a good root of title in 1951 when the subject land was sold and conveyed to Hoalim. It is upon the reference in 1878 to the plan endorsed on the 1860 grant that the question of constructive notice of the covenant for reacquisition contained in the 1860 grant turns.

Their Lordships turn to the first question — that arising on the Collector's appeal — firstly and mainly whether the Registration of Deeds Ordinance 1886 applies at all to State grants. Their Lordships are informed that all land in the Republic of Singapore in private hands was originally the subject of a Crown (State) grant: and they are also given to understand that in fact no Crown or State grant has ever been registered under the Registration of Deeds Ordinance 1886, or under its successor Act, or under the earlier Indian Act 16 of 1839. In that climate of non-feasance it would indeed be strange if the need for registration were to be discovered for the first time in the 1970's.

The first document for consideration is the Indian Act 16 of 1839, which was in force in Singapore at the date of the 1860 grant, and is relevant for consideration of the applicability of the Registration of Deeds Ordinance 1886 to original Crown grants. The 1839 Act was primarily concerned with regulation and assessment of rents payable to Government in (*inter alia*) Singapore. Thereunder the Collector could grant leases of Crown land, and was required (obviously for administrative convenience) to maintain in his office a register of the details of such leases. The relevant section is section XI. Thereunder

(Clause First) "All *mutations* by act of party or by succession in titles to land... shall be registered under the following rules."

(Clause Second) "The party claiming by right of *transfer* or succession shall attend at the Collector's office... and shall make application for registering the mutation, producing the original grant or lease...."

(Clause Fifth): "The registry of a mutation shall not of itself be taken to convey or establish any legal title to land.... But no deed whatsoever for the sale or transfer of land... shall be admitted to be valid by the officers of Government, or be received in evidence as a legal instrument by any Court of Judicature, unless the same shall have been registered in the Collector's office in the manner directed by this section...."

Their Lordships have no doubt that these provisions were inapplicable to a grant by the Crown (State) of land in Singapore. They refer only to a transfer or mutation of title by a subject of the subject matter of an original State grant.

The next document for consideration is the Registration of Deeds Ordinance 1886. This recited that it was expedient to prevent secret and fraudulent conveyances and provide means whereby the title to real property may be more certainly known: an appropriate phrase if directed against a double-selling sub-

ject though not against a double-granting Crown. Under that Ordinance "Assurance" includes "Any conveyance". "Conveyance" includes "Any assignment ... made by deed on a sale...." Section 5 so far as now relevant is in these terms:

"From and after the coming into operation of this Ordinance ...and subject to the provisions of this Ordinance and any rules made thereunder all assurances thereafter executed or made... by which any land... is affected and all assurances theretofore executed or made... by which any land... is affected and which have not been registered under Indian Act 16 of 1839 may be registered in such manner as is hereinafter directed and unless and until so registered shall not be admissible in any court as evidence of title to such land provided that the provisions of section 13 of this Ordinance shall not apply to the case of the assurances last hereinbefore mentioned."

It was contended for Hoalim that the words "and which have not been registered under Indian Act 16 of 1839" were designed merely to avoid duplication of registration, and that consequently they in no way narrowed the scope of "all assurances theretofore executed". Their Lordships are of opinion however that those words refer rather to assurances that were registrable under the Indian Act which as already indicated did not include Crown grants in fee: see also para. 12 of Schedule II to the Ordinance prescribing the fee payable on registration of "every assurance *which might have been* registered under" the Indian Act. Moreover section 13 (excluded by section 5 only as to assurances prior to the 1886 Ordinance) required on the occasion of registration of any deed the attendance of the parties thereto before the Registrar to admit execution, a requirement appropriate to a transaction after the original Crown grant but singularly inappropriate to a case of original Crown grant. Further section 6 of the 1886 Ordinance lays down the manner in which the registration of "any instrument" under the Ordinance should be effected: sub-section (2) (D) requires that on presentation of an instrument for registration an entry should be made in a Book of Reference setting forth (*inter alia*)

"The reference numbers of the Crown grants or leases (if any) in which the lands affected by such instrument are respectively comprised."

There was some discussion as to the significance of the words "(if any)" which their Lordships did not find helpful to the solution. The reference numbers referred to are the numbers in sequence of initial Crown grants in the relevant district and the number of the relevant survey. This provision assumes that the instrument to be registered is a dealing with land which has *previously* been comprised in a Crown grant — an occasion of mutation from subject to subject of an estate or interest previously erected, for the first time, by a Crown grant. That this is so is borne out by the rules made under the 1886 Ordinance (to which section 5 is made subject): rule 15 requires there to be kept at the Registry (*inter alia*) a Book of Reference: rule 16 lays down the form for that Book: that form in one column requires the insertion of "the reference Numbers of the Crown grants or leases in which lands affected are comprised", those numbers being the survey number and the title number referred to above. This form is entirely inapt for the registration of the actual Crown grant itself. The same point may be made in relation to the form of the Index of Names and Index of Lands also required to be kept under rules 15, 18 and 19. A further argument for the Collector was mounted on a scrutiny of different provisions as to fees payable in relation to inspection of documents registered under the Ordinance and of particulars of Crown grants kept at the Land Office, which office maintained a record of all Crown grants. Their Lordships do not think it necessary to analyse those arguments. Nor do they consider it necessary to consider whether, if Crown grants were within the requirements of the Registration of Deeds Ordinance, the disabilities attached to non-registration would extend by necessary implication to bind the Crown.

It follows from the above that non-registration will not avail the respondent Hoalim, who can only succeed in avoiding a depressant effect on the market value of the subject land of the provision in the 1860 grant if on the cross-appeal (a) he is correct in saying that the provision operated by way of covenant and not also by way of condition: and (b) he purchased in 1951 without notice actual or constructive of the provision. Under (b) their Lordships are concerned only with the question of constructive notice.

Their Lordships turn next to the second question, the first on the cross-appeal: whether the language of the 1860 grant was both a condition and a covenant. If as was held below it was a condition of the grant as well as a covenant the respondent Hoalim cannot escape from it on the ground of his purchase for value without notice. The cases on this matter are largely ancient, have turned upon nice differences in language, and scarcely offer a firm foothold for decision today. It is to be observed that where there is a conveyance upon a condition, then upon that condition being broken there is an implied right in law in the grantor to re-enter, and by such re-entry to determine the estate granted, that estate remaining in the grantee until the assertion (or perhaps execution) of the right of re-entry. In the instant case their Lordships apprehend that if there were a condition the right of re-entry would be a qualified right, exercisable only on payment of the sums mentioned. Their Lordships are of opinion that the language of the 1860 grant is not such as to impose a condition. True, the words "subject ... to ... conditions" are present: but the instrument then ("that is to say") defines what is meant by those words, namely a covenant. Moreover a condition and covenant may readily co-exist in a case such as (for example) a condition that the grantee his heirs etc. shall not without consent of the grantor his heirs etc. fell timber trees and the grantee for himself etc. covenants not so to fell: in such case there are different remedies under condition (re-entry) and covenant (damages, injunction). But their Lordships were not introduced to any case in which condition and covenant were held to co-exist, where (as here) the remedy conferred upon the grantor under the covenant would be co-extensive with the remedy under the alleged condition. Finally it may be said that if there be here condition, it was that the covenant be entered into: and that condition was immediately fulfilled. In support of his argument for a condition counsel for the Collector made three particular points. First: a Crown grant will be construed most favourably to the Crown. Second: if there be

not here a condition the introductory words before the covenant are superfluous. Third: it is unlikely that the Crown in 1860 should have intended, when the future of the colony was not predictable, to provide for future public user requirements in a manner (covenant only) that might be valueless should the land come to the hands of a purchaser for value without notice. All these are points worth making in argument, but they do not persuade their Lordships.

The rights of the State depending only upon an equitable interest under the covenant, the final question is whether Hoalim when he bought in 1951 had constructive notice of that interest, viz: the contents of the 1860 grant. Their Lordships stress that the allegation of constructive notice is not founded upon a suggestion that Hoalim must have known that the original title stemmed from a Crown grant and should have searched at the Land Office for its contents. The allegation rests entirely upon the fact that in the 1878 conveyance, the root of title, the description of the island conveyed included the reference already quoted to the plan endorsed upon the 1860 grant. It was contended that any purchaser must reasonably be expected to require production of the plan, to examine it, and also to read the instrument upon which it was endorsed. Their Lordships are quite unable to accept this. They have already referred to the superfluity, nay irrelevance, for the purpose of identification of this island of the reference to the plan in the 1860 grant. The same comments are applicable to the schedule to the 1878 conveyance. The island conveyed was completely and perfectly identified in a manner upon which no survey plan could improve: or if perchance it displayed some conflict with the already complete and perfect identification it would have to be rejected. Their Lordships see no ground for holding that in those circumstances Hoalim was in any sense of the word required to look at the 1860 grant. In concluding therefore that there was here no constructive notice, their Lordships wish only to add that the phrase, sometimes found, "notice of a deed is notice of its contents" must not be taken as of universal literal application.

Accordingly both appeal and cross-appeal will be allowed, in each case with costs, with any appropriate set-off.

In the result the order of the Court of Appeal will be varied as follows:

(1) By substituting for its opinion on question (i) in the Case Stated the following Answer: "The said provision is a covenant creating an equitable interest in land and not also a condition".

(2) By substituting for its opinion on question (v) in the Case Stated the following Answer: "The non-registration of the original grant does not enable the appellant Hoalim to assert that for that reason he is not bound. The appellant Hoalim did not have constructive notice of the provision".

Appeal and cross-appeal allowed.

Solicitors: *Coward Chance; C. Butcher & Simon Burns.*

MENAKA v. LUM KUM CHUM

[P.C. (Lord Simon of Glaisdale, Lord Fraser of Tullybelton and Lord Russell of Killowen) December 21, 1976]

[Privy Council Appeal No. 16 of 1974]

Contract — Loan made by moneylender in name other than registered name — Agreement forbidden by law — Contract void — Parties unaware of illegality until after execution of contract — Whether moneylender entitled to recover money lent and interest thereon — Contracts (Malay States) Ordinance, 1950, ss. 24 and 66.

Moneylenders — Money lent by moneylender in name other than registered name — Loan illegal and void — Moneylenders Ordinance, 1951, ss. 8(b) and (c) and 16.

This was an appeal from the decision of the Federal Court ([1973] 2 M.L.J. 154). The appellant was a registered moneylender carrying on business under the name of AR. PR. M Firm. Through her attorney she lent some money to the respondent on the security of a charge of certain lands belonging to the respondent. The loan was made by the attorney on behalf of the appellant personally. The appellant applied for an order for the sale of the lands to satisfy the principal sum and interest. The respondent objected to the application on the ground *inter alia* that, as the loan was not made in the registered name of the moneylender, the moneylender had contravened the provisions of section 8(b) and (c) of the Moneylenders Ordinance. The Federal Court by a majority held that the agreement in this case was forbidden by section 8(b) of the Moneylenders Ordinance and was therefore void. The majority held that the learned trial judge was right in the circumstances of the case in finding that neither the appellant nor her attorney was aware of the illegality of the transaction at the time of the execution of the documents and therefore section 66 of the Contracts (Malay States) Ordinance was applicable and the learned trial judge was right in ordering the return of the $19,400, the balance of the principal sum, to the appellant. The appellant appealed against the dismissal of her claim and before the Privy Council the respondent was given leave to cross-appeal against the decision of the Federal Court that he was liable for interest at 6% from the date of the raising the action.

Held: (1) the appellant in this case had contravened paragraph (c) of section 8 of the Moneylender Ordinance and therefore the contract and the security were unenforceable;

(2) in the circumstances of this case as neither party was aware of the illegality at the time of making the loan transaction and the documents were prepared and executed on both sides in complete good faith, the appellant was entitled to restitution of the balance of the principal sum of $19,400;

(3) the award of interest was in the discretion of the court and in this case as it had not been shown that the Federal Court committed any error of law in the exercise of their discretion, their decision will be upheld.

Cases referred to:-

(1) *Perpetual Executors and Trustees Association of Australia Ltd.* v. *Hosken* (1912) 14 C.L.R. 286.
(2) *Chai Sau Yin* v. *Kok Seng Fatt* [1966] 2 M.L.J. 54.
(3) *Cope* v. *Rowlands* 1836 2 M. & W. 149, 157.
(4) *Cornelius* v. *Phillips* [1918] A.C. 199.
(5) *Govindram Seksaria* v. *Radbone* (1947) L.R. 74 Ind. App. 295, 303.
(6) *Babu Raja Mohan Manucha* v. *Babu Manzoor Ahmad Khan* (1942) L.R. 70 Ind. App. 1, 10.
(7) *Cantiere San Rocco* v. *Clyde Shipbuilding and Engineering Co.* (1923) S.C. H.L. 105; [1924] A.C. 226.
(8) *Suganchand* v. *Balchand* A.I.R. 1957 Rajasthan 89.
(9) *Harnath Kaur* v. *Indar Bahadur Singh* (1922) L.R. 50 Ind. App. 69.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

Robert Gatehouse Q.C. (*Eugene Cotran* and *V.K. Palasuntharam* with him) for the appellant.

Nigel Murray (*M. Segaram* with him) for the respondent.